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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

AT&T TECHNOLOGIES, INC.,

Petitioner,

v.

RAYMOND C. BLIM, ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RAYMOND C. BLIM, MORRIS E. KINGHORN, J. F. VUKASOVIC, RALPH V. OLDHAM, STANLEY L. BOARTS, EUGENE FIRESTONE, WALLACE S. REPETTO, and LARRY N. STEWART,

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A number of grounds upon which Respondents (hereafter Plaintiffs) rely to argue that review of this case is inappropriate are inconsistent with the record or contrary to the weight of legal authority. Chief among them are the following:

1. In their discussion of the statistical evidence, Plaintiffs assert that AT&T-TI failed to object to the admission of evidence supporting their expert White's selection of a data pool (Pls.' Brief at 10-11), and that White's testimony never ventured beyond expressing opinions of statistically signifi-

cant relationships. (*Id.* at 6). These assertions are not supported by the record.

AT&T-TI's objections to White's "in-court statistical calculations" were fully preserved; indeed, AT&T-TI moved for a mistrial because of the surprise nature of the testimony. (J.A. 720).[1] Despite two pre-trial depositions at which he was questioned concerning selection of a data pool, White had not revealed the calculations offered at trial as a basis for his pool selection. (J.A. 720-22).

In addition, AT&T-TI filed written objections prior to trial to all of plaintiffs' statistical exhibits. (J.A. 47-49). The grounds for objection were the same grounds raised on appeal—that the exhibits were incompetent because of the methodology applied and the failure to make comparisons to relevant pools or groups of employees. These objections were overruled but were renewed at trial, and AT&T-TI was granted a continuing objection to all the statistical exhibits. (J.A. 630-31). AT&T-TI also objected at trial to White's lack of qualifications as an expert and to his testimony on probability testing on the grounds of surprise, since in his pre-trial depositions, White had testified that probability testing was inappropriate. (J.A. 622-24, 638). Plaintiffs' claims of waiver as to the statistical evidence are thus entirely unsupported.

Further, White's testimony was not limited to mere expressions of statistical relationships. Rather, he converted probability statistics into statements of mathematical certainty that younger employees had received preferences. Portions of the trial testimony containing these opinions are attached as Appendix A to this Reply Brief.

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[1] As in the Petition for Certiorari, "J.A." references are to pages of the Joint Appendix filed in the Court of Appeals.

2. Plaintiffs assert that the proposition that statistical evidence alone cannot prove discriminatory intent is erroneous as a matter of law. (Pls.' Brief at 19). This assertion fails to distinguish among the modes of proof applied in disparate treatment, disparate impact, and pattern and practice suits.[2]

The instant case alleges acts of disparate treatment; therefore, the basic issue is whether the particular promotion decisions affecting the Plaintiffs were discriminatory. The narrower question presented by this Petition is whether statistical data, as a type of circumstantial evidence that necessarily focuses on treatment of a group, can alone prove that any particular historical decision was discriminatorily motivated. In the absence of any evidentiary nexus between group statistics and individual decisions, the courts of appeals have declined to find that statistics alone are sufficient to satisfy this burden of proof. See decisions cited in Petition for Writ of Certiorari, July 16, 1984, pp. 12-13. This rule does not, as plaintiffs suggest, require direct proof of discriminatory intent contrary to *Aikens,* 103 S.Ct. at 1481, n. 3. Rather, it is a fundamental requirement that a

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[2] With the exception of *U.S. Postal Service Board of Governors* v. *Aikens,* 460 U.S. ...., n. 3, 103 S.Ct. 1478 (1983), the decisions cited by Plaintiffs are pattern and practice and disparate impact cases. It is clear from this Court's decisions in *Hazelwood School District* v. *United States,* 433 U.S. 299 (1977), and *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977), that statistical evidence can establish intent in a pattern and practice action where "gross disparities" are shown. The courts of appeals have interpreted these decisions to require an enhanced degree of disparity to prove intent in pattern and practice suits, a showing beyond the "marked disproportion" necessary to establish an adverse impact. *EEOC* v. *Federal Reserve Bank of Richmond,* 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds, sub nom. Cooper* v. *Federal Reserve Bank of Richmond,* 467 U.S. ...., 104 S.Ct. 2794 (1984); *Rivera* v. *City of Wichita Falls,* 665 F.2d 531 (5th Cir. 1982); *Gay* v. *Waiters Union, Local 30,* 694 F.2d 531 (9th Cir. 1982).

plaintiff establish some causal connection between a generally alleged unlawful motive and the specific employment decision which affected him.

The record in this case amply illustrates the point. Here the plaintiffs contended that the statistical evidence of their expert, allegedly linking performance appraisals with age, proved that the performance reasons advanced by AT&T-TI for its promotion decisions were pretextual. (Pls.' Brief at 9). Yet not a single plaintiff offered evidence that *his own* individual performance rating was in any respect the product of age discrimination. The jury instructions nonetheless allowed the jury to find pretext based on these statistics alone.

3. Plaintiffs' various arguments concerning statistical methodologies are largely irrelevant to the grounds for the writ.[3] However, they mischaracterize AT&T-TI's argument as a contention that standard deviation figures are the only appropriate form of statistical evidence. (Pls.' Brief at 16). The issue is not whether standard deviation analysis or any other methodology is the most appropriate means of analyzing statistical proof, but the extent to which statistical evidence, regardless of the form in which it is presented, satisfies standards of probity set forth in *Hazelwood* and subsequent cases. These standards necessarily incorporate a requirement that statistics, like other forms of scientific data, must be of a type generally accepted by experts in that

[3] Plaintiffs' assertion that their statistical evidence must have been sound because it used the same methodology as that applied by AT&T-TI's statistician is a non sequitur (Pls.' Brief at 14); application of a correct methodology to figures arbitrarily limited "to obtain a desired result" still results in a misleading statistic. See *EEOC* v. *Federal Reserve Bank of Richmond,* 698 F.2d at 649-50. The factual premise is also erroneous, since White applied a "goodness of fit test" based on a uniform distribution; AT&T-TI's statistician did not apply these techniques. (J.A. 638, 678-80, 1013).

field. *See Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923); *Fed. R. Evid.* 703. Plaintiffs have generously illustrated the abuse of this principle by arguing to this Court, as they argued to the jury below, that probability findings well below accepted standards of significance showed a relation between age and repromotion sufficient to justify a finding of pretext. (Pls.' Brief at 8-9).

Respectfully submitted,

AT&T TECHNOLOGIES, INC.

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September 18, 1984

CERTIFICATE OF SERVICE

I, Christine H. Perdue, counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit and Appendix A thereto in the United States Mail, first class postage prepaid, this 18th day of September, 1984, addressed to: Philip F. Horning, Esquire and James R. Moore, Esquire, Horning, Johnson & Grove, 1800 City National Bank Tower, Oklahoma City, Oklahoma 73102; and Howard K. Phillips, Clerk, United States Court of Appeals for the Tenth Circuit, Denver, Colorado 80294.

CHRISTINE H. PERDUE
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APPENDIX A

Q All right. Now, moving to the next year, you applied the test in 1975, is that correct?

A That's right.

Q What did it reveal?

A Again taking all three appraisal categories as a group, I believe the data showed that 97 percent of the time you would get a closer fit to uniform distribution than what you observed here which would be—could be interpretted to mean that I would include in 1975 age and appraisals were in fact related.

Q All right.

A In other words, they were not independent variables.

Q Is that a professional opinion you could make?

A Yes, it is.

Q Well, if you're 97 percent certain that age and appraisals were tied together, what was the nature of their relationship. Can you tell me that?

A Well, to the—from the standpoint that the differences, and I'm saying the differences between categories are such that the older the section chiefs were, the more likely they were to have received a good minus appraisal rating just looking at this, this chart right here. And I think you can apply the same—the same analysis up here. There's not much difference there. So the significance is realized of the difference between the outstanding appraisal categories over here and the good minus appraisal categories for 1975.

Q Well, then—

A And probably the correct way to state that as I would

be 97 percent certain that the appraisal ratings were not distributed without regard to age.

* * * * *

Q (BY MR. HORNING) Well, did you then at our request apply statistical testing to the data on this chart?

A Yes, I did.

Q Were those the same tests you used on the chart we just discussed?

A Yes, sir.

Q What did the testing show?

A It shows essentially the same thing that the previous test showed that it's my professional opinion that age at re-promotion and repromotions are not independent of one another. They were dependent. They were associated, and it's—I would conclude based on this in a statistical sense, that the younger section chiefs again received preference in terms of repromotions as compared to the older section chiefs.

Q All right. And with what degree of certainty did you make that statement based on those tests?

A About 99 percent certainty.